

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY LEWIS BARRONS,

Defendant-Appellant.

UNPUBLISHED

April 17, 2012

No. 303513

Tuscola Circuit Court

LC No. 09-011299-FH

Before: MARKEY, P.J., and MURRAY and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right his conviction by a jury of embezzlement over \$50 by a public official, MCL 750.175. Defendant was sentenced to five years' probation, with one year in jail (180 days deferred). We affirm.

Defendant was the Superintendent of the Indianfields Township Cemetery and Parks. In this capacity, he sold burial plots and other incidentals associated with the plots in the township cemetery and rented pavilion space in the township park. He was charged with four counts of embezzlement over \$50 by a public official. The prosecution moved pretrial to admit evidence of an uncharged occurrence in which defendant received \$1,800 in cash from a customer, Mr. Colling, for cemetery plots and did not turn over the proceeds or the receipt copy to the township. The prosecution argued that defendant did not turn over any cash received by him in his work capacity from 2003 until 2008, and that this other act was relevant under MRE 401¹ and admissible under MRE 404(b)(1) as evidence of defendant's scheme or plan. The trial court granted the motion.

Defendant argues on appeal that the evidence regarding the Colling transaction was introduced merely to show that he had the propensity to engage in criminal activities. He contends that the evidence was not relevant to show a scheme or plan because the amount

¹ Under MRE 401, relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

involved was much larger than in the charged incidents and typically burial plots are paid by check.

This Court reviews a trial court's evidentiary decisions for an abuse of discretion. *People v Martzke*, 251 Mich App 282, 286; 651 NW2d 490 (2002). A trial court abuses its discretion when its decision falls outside the range of principled outcomes. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008).

MRE 404(b)(1) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

“To be admissible under MRE 404(b), bad-acts evidence must satisfy three requirements: (1) the evidence must be offered for a proper purpose; (2) the evidence must be relevant; and (3) the probative value of the evidence must not be substantially outweighed by [the danger of] unfair prejudice.” *People v Kahley*, 277 Mich App 182, 184-185; 744 NW2d 194 (2007).

The trial court did not abuse its discretion in admitting evidence of the Colling transaction. Like the charged incidents, the Colling transaction was a recent (within a year of the charged transactions) cash transaction in which defendant gave the customer a receipt and did not turn the cash proceeds or the receipt over to the township. Mr. Colling testified that he paid \$1,800 in cash for some burial plots and received a receipt from defendant. Other testimony established that this cash and the copy of the receipt given to Mr. Colling were not reflected in township records. This evidence was relevant to the charges of embezzlement regarding other incidents. In addition, it was introduced for a proper purpose — to show a scheme or plan to embezzle funds from the township. Finally, there was no danger of unfair prejudice. The trial court cautioned the jury that, if the evidence regarding the Colling transaction was believed, the jury could only consider it for the purpose of determining whether defendant used a plan, system, or scheme, and the evidence should not be used to show that defendant was a bad person or likely to commit the charged offenses. And, the fact that the amount involved in the Colling transaction was significantly more than the amounts involved in the charged transactions did not outweigh the probative value of the evidence. We find no abuse of discretion in admitting this evidence.

Next, defendant argues that the trial court's jury instructions confused the jury with regard to the elements of the charge of embezzlement by a public official. Defendant specifically points to the court's summary of the elements of the crime where it omitted the element of criminal intent. Defendant further contends that the instructions and verdict form did not specify which of the alleged acts related to each charged count. Although defendant did not challenge the instructions or verdict form before the trial court, *People v Lueth*, 253 Mich App 670; 688; 660 NW2d 322 (2002), we will nonetheless consider the issue.

A trial court must instruct the jury concerning the law applicable to the case and must fully and fairly present the case to the jury in an understandable manner. MCL 768.29: *People v Mills*, 450 Mich 61, 80; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212 (1995); *People v Jones*, 419 Mich 577, 579; 358 NW2d 837 (1984). Jury instructions should be considered in their entirety, rather than extracted piecemeal, to determine whether there was error requiring reversal. *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). “Even if somewhat imperfect, there is no error, if the instructions fairly presented the issues to be tried and sufficiently protected the defendant’s rights.” *Id.* A criminal defendant is entitled to have a properly instructed jury consider the evidence against him. *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). Jury instructions must include all elements of the charged offenses and any material defenses and theories supported by the evidence. *Id.* If the instructions, reviewed in their entirety, sufficiently protected the defendant’s rights and fairly presented the issues to the jury, reversal is not required. *Id.*

Defendant was charged with four counts of embezzlement by a public official over \$50. At trial, evidence of at least five acts of embezzlement, of amounts ranging from \$30 to \$200, was presented. The trial court described the elements required to find defendant guilty of embezzlement by a public official, including (1) defendant held a public office or was the agent or service of a public official, (2) defendant received money in his official position, (3) defendant knew the money was public property, (4) defendant used the money for an unauthorized purpose, and (5) the money was worth \$50 or more. The court further instructed the jury:

If you determine beyond a reasonable doubt the defendant was a public official, that the defendant received [\$]50 or more in his official position and that the defendant did not deliver all the money the defendant received as a public official to his successor, then these facts, if not explained, are circumstances from which you may infer that the defendant intended to embezzle the money. However, you do not have to make this inference.

When read in their entirety, the trial court’s “instructions fairly presented the issues to be tried and sufficiently protected the defendant’s rights.” *Bell*, 209 Mich App at 276. We find no error requiring reversal in the trial court’s jury instructions.

Defendant maintains that his trial counsel was ineffective for failing to object to the jury instructions or verdict form. We review the trial court’s factual findings, if any, for clear error, and the constitutional issue de novo. *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). To establish ineffective assistance of counsel, a defendant must show (1) that counsel’s performance was below an objective standard of reasonableness under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

Defendant has failed to establish any error arising from the verdict form or the trial court’s jury instructions. Moreover, defendant’s attorney successfully argued that the prosecution did not prove four counts and that, at most, all of the acts resulted in one act of embezzlement. The jury convicted defendant of one count of embezzlement, consistent with defendant’s trial strategy and the argument of his attorney. Therefore, defendant’s argument that

his trial counsel was ineffective for failing to raise these issues at trial also fails. Counsel was not required to raise a meritless objection. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Affirmed.

/s/ Jane E. Markey
/s/ Christopher M. Murray
/s/ Douglas B. Shapiro